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In the

Supreme Court of the United States

ANN VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* CAMPAIGN FOR FAMILY FARMS AND 49 FAMILY FARM AND RANCH ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 6
ARGUMENT 7
I. THE BEEF ACT VIOLATES RANCHERS' FIRST AMENDMENT RIGHT OF FREEDOM OF ASSOCIATION. 7
A. The Beef Act Compels Ranchers To Associate With Groups and Speech They Abhor 7
B. The Beef Act Serves the Interests of Packers and Retailers and Not a Paramount Governmental Interest, Making Packers and Retailers the True Free Riders of the Checkoff. 13
II. THE BEEF CHECKOFF VIOLATES RANCHERS' FIRST AMENDMENT RIGHT OF FREEDOM OF SPEECH. 17
A. Checkoff-Funded Speech Is Inextricably Intertwined With Expressly Ideological And Politically Partisan Speech. 17
B. The Beef Checkoff, Paid Solely By Ranchers To Benefit The Beef Industry, Fails The *Central Hudson* Test. 22
1. The government's interest is not substantial 23
2. The beef checkoff does not directly advance any asserted government interest. 25

3. The beef checkoff is far more extensive than necessary to serve any asserted governmental interest. 26
CONCLUSION 30
APPENDIX ..... A - 1

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ..... passim
Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983) 18
Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 13
Buckley v. Valeo, 424 U.S. 1 (1976) 13
Central Hudson Gas & Elec. Corp. v. Public Ser. Comm'n, 447 U.S. 557 (1980) ..... passim
Charter v. USDA, 230 F. Supp. 2d 1121 (D. Mont. 2002) 20
Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 17
Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004) *petition for cert. filed* (U.S. Sept. 30, 2004) (No. 04-446) 19, 20, 23
Edenfield v. Fane, 507 U.S. 761 (1993) 23
Ellis v. Brotherhood of Ry., 466 U.S. 435 (1984) 16
Elrod v. Burns, 427 U.S. 347 (1976) 13
Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) ..... passim
Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 25
Keller v. State Bar of Cal., 496 U.S. 1 (1990) 8, 13
Kusper v. Pontikes, 414 U.S. 51 (1973) 13
Larson v. Valente, 456 U.S. 228 (1982) 7
Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) 27
Lathrop v. Donohue, 367 U.S. 820 (1961) 13
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 16, 17

Livestock Mktg. Ass'n v. USDA, 132 F. Supp. 2d 817 (D.S.D. 2001) 10
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 29
Michigan Pork Producers Ass'n v. Campaign for Family Farms, 229 F. Supp. 2d 772 (W.D. Mich. 2002) ..... passim
Michigan Pork Producers Ass'n v. Veneman, 348 F.3d 157 (6th Cir. 2003) *petition for cert. filed sub nom. Veneman v. Campaign for Family Farms* (U.S. Feb. 19, 2004) (No. 03-1180) 2, 8, 24
NAACP v. Alabama, 357 U.S. 449 (1958) 7
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 7
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 18
Nike, Inc. v. Kasky, 539 U.S. 654 (2003) 17
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 17
Pelts & Skins, LLC v. Landreneau, 365 F.3d 423 (5th Cir. 2004) *petition for cert. filed* (U.S. June 30, 2004) (No. 04-23) 27
Riley v. Nat'l Fed'n. of the Blind, 487 U.S. 781 (1988) 18
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 7
Ry. Employees' Dept. v. Hanson, 351 U.S. 225 (1956) 13, 16
Thompson v. W. Med. States Ctr., 535 U.S. 357 (2001) 26
United Foods, Inc. v. United States, 197 F.3d 221 (6th Cir. 1999) 16
United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), *cert denied*, 493 U.S. 1094 (1990) 23, 24

United States v. United Foods, Inc., 533 U.S. 405 (2001) ..... passim
Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 17
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 8
Wooley v. Maynard, 430 U.S. 705 (1977) 8

Constitutional Provisions

U.S. Const. amend. I ..... passim

Statutes

7 U.S.C. § 612c 27
7 U.S.C. § 2612(e) 28
7 U.S.C. § 2901(a)(2) 25
7 U.S.C. § 2901(a)(3) and (4) 14, 23
7 U.S.C. § 2901(b) 29
7 U.S.C. § 4502(l) 28
7 U.S.C. § 4606(e)(4) 28
7 U.S.C. § 4902(5) 28
7 U.S.C. § 6402(4) 28
7 U.S.C. § 7401(e) 28
7 U.S.C. §§ 7411-7425 25
7 U.S.C. § 7482(11) 28
7 U.S.C. § 7982 27
Pub. L. No. 107-171, § 10816, 116 Stat. 134 (2002) 12
Pub. L. No. 108-199, § 749, 118 Stat. 3 (2004) 12

Rules

Sup. Ct. R. 37.3(a) 1
Sup. Ct. R. 37.6 1

Regulations

67 Fed. Reg. 63,070 (Oct. 10, 2002) 27
69 Fed. Reg. 1,694 (Jan. 12, 2004) 28
69 Fed. Reg. 42,030 (July 13, 2004) 15
7 C.F.R. pt. 716 27
7 C.F.R. § 1218.53 28
21 C.F.R. § 189.5 28

Legislative Materials

150 Cong. Rec. S174-S175 (daily ed. Jan. 22, 2004) 12
H.R. Rep. No. 584, 108th Cong. (2004) 27
S. Rep. No. 340, 108th Cong. (2004) 27

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National Pork Board, *Hog Marketing Contract Study* (Jan. 2004), *available at* http://agebb.missouri.edu/mkt/vertstud04.htm 4

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Oral Argument Tr., *United States v. United Foods, Inc.*, No. 00-276, (Apr. 17, 2001) 28

Philip Brasher, *Politics Thrusts Ag Stakes Higher*, Des Moines Register, Aug. 29, 2004 11

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Thomas Jefferson, Virginia Act for Establishment of Religious Freedom (1786), codified at Va. Code § 57-1 1
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USITC Inv. 701-TA-386, Letter to Lynn Bragg, Chair, U.S. International Trade Commission (Oct. 5, 1999) 5
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www.beef.org/dsp/dsp_locationContent.cfm?locationId=881 11
www.beefboard.org/ 9

www.beefboard.org/documents/dairy_nutrition%20Dec%2023.pdf 10
www.beefitswhatsfordinner.com/ads/default.asp 9
www.beefitswhatsfordinner.com/ads/tv.asp 8
www.beefitswhatsfordinner.com/askexpert/inthenews.asp 10
www.beefitswhatsfordinner.com/footer/aboutus.asp 9
www.beefmark.com 21
www.dairycheckoff.com/check/hl0904.asp 21
www.ers.usda.gov/Briefing/FarmIncome/Data/Hh_t5.htm 21
www.usda.gov/agency/obpa/Budget-Summary/2005/19.BSE.htm 27
www.whymilk.com/celebrity_archive.htm 9
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STATEMENT OF INTEREST[1]

"Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to its liberty and interests by the most lasting bonds." 5 The Writings of Thomas Jefferson 93 (Albert E. Bergh ed.) (1905).

"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Michigan Pork Producers Ass'n v. Campaign for Family Farms,* 229 F. Supp. 2d 772, 774 (W.D. Mich. 2002) (*MPPA* I) (quoting Thomas Jefferson, Virginia Act for Establishment of Religious Freedom (1786), codified at Va. Code § 57-1).

These two Jeffersonian ideals are melded by *Amici Curiae* the Campaign for Family Farms (CFF) and 49 family farm and ranch organizations[2] who join Respondents in their opposition to the Beef Act's mandatory promotion program (beef "checkoff").

CFF is a coalition of family farm organizations whose hundreds of hog farmer members oppose paying the mandatory pork checkoff. CFF conducted a petition drive that resulted in a USDA-conducted referendum on the pork checkoff program in which the majority of participating hog farmers voted to terminate the program. Secretary of Agriculture Veneman refused to honor the referendum.

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for any party to these proceedings authored, in whole or in part, this *Amici Curiae* brief. No other entity or person, aside from the *Amici*, made any monetary contribution for the preparation or submission of this brief to the Court. This brief is filed pursuant to Sup. Ct. R. 37.3(a). The requisite consent letters have been filed with the Clerk.

[2] *Amici* are listed in the attached Appendix.

MPPA I, 229 F. Supp. 2d at 775. After this Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001),[3] CFF and four individual hog farmers, James Dale Joens, Richard Smith, Rhonda Perry, and Lawrence E. Ginter, Jr., brought a claim before the United States District Court for the Western District of Michigan alleging that the pork checkoff violates hog farmers' First Amendment rights of freedom of speech and association. *MPPA* I, 229 F. Supp. 2d at 775. On October 25, 2002, the district court granted CFF's motion for summary judgment, holding that the pork checkoff was "unconstitutional and rotten" and violated hog farmers' First Amendment rights of free speech and association. *Id.* at 791. The Sixth Circuit affirmed the district court's ruling, finding that the pork checkoff compels hog farmers "to express a message with which they do not agree." *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 163 (6th Cir. 2003) (*MPPA* II) *petition for cert. filed sub nom. Veneman v. Campaign for Family Farms* (U.S. Feb. 19, 2004) (No. 03-1180).

Joining CFF in submitting this brief are 49 family farm and ranch organizations with members from all 50 states. These organizations represent hundreds of thousands of family farmers and ranchers who raise cattle, hogs, other livestock, and poultry; milk dairy cows; grow corn, soybeans, and other commodities; and produce and market locally grown fruits and vegetables. The organizations include the National Farmers Union (an organization of 250,000 members), the National Family Farm Coalition (a coalition of 21 family farm groups), the National Farmers Organization, the Federation of Southern Cooperatives, the Intertribal Agriculture Council, state cattle and ranch organizations, state and national sustainable agriculture organizations, and other

[3] CFF joined family farmers and ranchers in filing an *Amici Curiae* brief in *United Foods* urging this Court to affirm the Sixth Circuit's ruling.

leading state and national farmer-based organizations. *Amici* strive to build sustainable rural communities, promote responsible stewardship of soil, water, and other resources, and ensure that land can be farmed and grazed for future generations.

Amici represent hundreds of thousands of "cultivators of the earth" who pay and ardently oppose mandatory agricultural checkoffs, which compel them to fund objectionable ideological speech that is aligned with private industry organizations' policies. These policies must be viewed in the context of the dramatic changes in agriculture. Agribusiness corporations are consolidating and controlling increasingly more agricultural industries.[4] Note, *Challenging Concentration of Control in the American Meat Industry*, 117 Harv. L. Rev. 2643 (2004). As the number of meatpackers shrinks, ranchers find themselves with at most three meatpackers to buy their cattle, and in some markets only one. Roger A. McEowen, *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 Drake J. Agric. L. 267, 274 (2002). USDA's Small Farms Commission observed: "Concentration translates into the loss of open and competitive markets at the local level . . . . The basic tenets of a 'competitive' market are less and less evident in crop and livestock markets today." USDA Nat'l Comm'n on Small Farms, *A Time to Act: A Report of the USDA National Commission on Small Farms*, 4-5 (Jan. 1998), *available at* http://www.csrees.usda.gov/nea/ag_systems/pdfs/time_to_act_1998.pdf.

With fewer marketing options come lower prices for farmers and ranchers, driving them into unfavorable

[4] Four meatpackers control over 81% of the cattle slaughter industry and four meatpackers control 56% of the hog slaughter industry. USDA, GIPSA, *Assessment of the Cattle and Hog Industries: Calendar Year 2001* 18, 38 (June 2002), *available at* http://www.usda.gov /gipsa/pubs/01assessment/01assessment.pdf.

contracts[5] or out of business.[6] *Id.* at 36-37; Clement E. Ward, *Concentration in the Red Meat Packing Industry*, at *Role of Captive Supplies in Beef Packing* (1996), *available at* http://www.usda.gov/gipsa/pubs/packers/conc-rpt.htm#chap3. For those ranchers who remain, there have been multiple years of raising cattle with significant financial losses, forcing ranchers to give up health insurance, take off-ranch jobs to supplement income, and incur more debt. Terence P. Stewart, *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 Minn. J. Global Trade 449, 455-86 (2000).

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[5] Approximately 33% of the United States cattle supply is being marketed through contracts to meatpackers. USDA, GIPSA, *Captive Supply of Cattle and GIPSA's Reporting of Captive Supply* at viii (2002), *available at* http://www.usda.gov/gipsa/pubs/captive_supply/captivesupplyreport.pdf. In the hog industry, more than 88% of hogs were committed to packers through ownership or contractual arrangements in 2004, up from 56% in 1997. National Pork Board (NPB), *Hog Marketing Contract Study* (Jan. 2004), *available at* http://agebb.missouri.edu/mkt/vertstud04.htm.

[6] Nationwide, the number of farmers and ranchers fell from 6.8 million in 1935 to fewer than 2 million in 1997. Robert A. Hoppe, *Structural and Financial Characteristics of U.S. Farms: 2001 Family Farm Report*, USDA ERS Agriculture Information Bulletin No. 768, 6-7 (May 2001), *available at* http:www.ers.usda.gov/publications/aib768/aib768.pdf. When the beef checkoff became mandatory in 1988, there were approximately 1,350,000 cattle operations in the United States; as of 2003, the number had diminished to 1,036,000, an almost 24% decrease. USDA NASS, *Number of All Cattle and Beef Cow Operations, United States, 1988-2003* (Apr. 30, 2004), *available at* http://www.usda.gov/nass/aggraphs/acbc_ops.htm. The number of dairy farms has decreased dramatically from 650,000 in 1970 to approximately 90,000 in the early 2000s. USDA ERS, *Dairy: Background* (July 6, 2004), *available at* http://www.ers.usda.gov/Briefing/Dairy/Background.htm. The same holds true in the hog industry. In 1980 there were 666,550 hog farms in the United States; as of 2003, the number had diminished to 73,600. The PigSite News Print, *US Swine Economics Report* (May 19, 2004), *available at* http://www.thepigsite.com/LatestNews/print-news.asp?display=7577.

The decline in the number of farmers and ranchers combined with the shift toward consolidation and corporate control of livestock has had devastating economic effects on independent family farmers and ranchers and their rural communities. As acknowledged by 24 United States Senators, when cattle ranchers suffer, rural communities suffer:

> Given that beef cattle production comprises the largest single component of the country's agricultural base, the perilous state of the cattle industry adversely affects the economic health of our rural communities and our states as a whole. When cattle producers go out of business, Main Street in much of rural America goes out of business. The crisis in the cattle industry has led to depopulation of rural areas, the closing of schools and entire towns, and declining tax bases for local, county, and state governments. In some states, families may have to drive a hundred miles or more to obtain provisions because of the collapse of so many towns.

USITC Inv. 701-TA-386, Letter to Lynn Bragg, Chair, U.S. International Trade Commission (Oct. 5, 1999).

In order to preserve and protect rural communities, *Amici* have advocated for many years for the strengthening of the family farm and ranch system of agriculture. In their efforts to preserve independent family farms and ranches, *Amici* have encountered significant opposition from associations that are funded by and support the beef checkoff and other mandatory agricultural checkoffs. *Amici* have witnessed firsthand the negative consequences the policies of checkoff-funded organizations have had on America's family farm and ranch system of agriculture. *Amici* and their members object for economic, ideological, and political reasons to the beef checkoff and other mandatory checkoffs; they believe the mandatory checkoffs contribute to further industry vertical integration and consolidation to the detriment of the family

farm and ranch system of agriculture. The trends described above will only be exacerbated if the beef checkoff continues to compel ranchers to fund their own demise. Therefore, *Amici* fully support Respondents in urging the Court to affirm the Eighth Circuit's ruling that the beef checkoff is unconstitutional and should be terminated.

SUMMARY OF ARGUMENT

Mandatory agricultural promotion programs compel farmers and ranchers to fund messages to which they object. The checkoffs associate all farmers and ranchers who pay the checkoff with those objectionable messages through attribution and through the compelled funding itself. They also compel farmers and ranchers to associate with the private boards and organizations that administer the programs. Those organizations spend, collectively, hundreds of millions of farmers' and ranchers' hard-earned dollars each year to fund programs the farmers and ranchers vehemently oppose. They use that money to keep their organizations afloat, and use the credibility derived from being the "voice" of farmers and ranchers through the checkoffs to lobby against family farmers' and ranchers' interests on political issues.

The purported governmental interest in the checkoff programs is to stimulate demand for each of the commodities they promote, yet many of those commodities actually compete in the marketplace. The government cannot satisfy its heavy burden to justify the infringement on farmers' and ranchers' First Amendment association rights when the only interests at stake are the conflicting interests of private industry participants.

The speech generated by the checkoffs is more than merely commercial; it is also ideological and political, and the effects on those compelled to finance it have been degrading rather than helpful. Because the checkoffs compel farmers and ranchers to fund ideological and political speech, they should be subject to the highest level of scrutiny. Under this Court's compelled speech precedent, the Beef Act is

unconstitutional. Even under an intermediate level of scrutiny, the beef checkoff is unconstitutional.

ARGUMENT

I. THE BEEF ACT VIOLATES RANCHERS' FIRST AMENDMENT RIGHT OF FREEDOM OF ASSOCIATION.

A. The Beef Act Compels Ranchers To Associate With Groups and Speech They Abhor.

The Court has long embraced the paramount importance of the constitutional right of association, recognizing that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court also has made it clear that the First Amendment guarantees a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-09, 932-33 (1982); *Larson v. Valente*, 456 U.S. 228, 244-46 (1982); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)). Freedom of association "plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623 (citing *Abood*, 431 U.S. at 234-35). Compelling an individual to financially support an organization for expressive purposes interferes with the individual's First Amendment right to associate for the advancement of ideas, or to refrain from doing so. *Abood*, 431 U.S. at 234-36.

Ranchers who pay the mandatory checkoffs are compelled to associate with the speech of the groups that administer them. All ranchers are compelled to fund—and thus associate with—the generic promotion of beef. As detailed in Respondents' brief, ranchers believe that beef raised, slaughtered, and processed in the United States is a superior product and should be marketed as such. They object

to the generic promotion of beef, including imported beef, because it tells consumers that all beef is the same, which they do not believe. U.S. Petition for Certiorari Appendix (U.S. Pet. App.) 11a, 35a-37a. Like the mushroom growers in *United Foods*, their livelihood depends on the sale of their product. Also like the mushroom growers, they believe the generic promotion has a detrimental effect on their livelihood.

Although ranchers are not compelled by mandatory checkoffs to directly utter the objectionable messages, as in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), they are associated with the speech by being coerced to support it as a precondition of earning a livelihood. By virtue of being part of a discrete group that earns their living by ranching, they alone, and not a general group of taxpayers, are compelled to fund the message associated with the checkoffs and the groups that administer them.[7] *Cf. Keller v. State Bar of Cal.*, 496 U.S. 1, 10-11 (1990); *Abood*, 431 U.S. at 259 n.13 (Powell, J. concurring).

Even more strongly associating ranchers with the objectionable speech they are compelled to support is the visible attribution of the speech to them. *See Wooley v. Maynard*, 430 U.S. 705 (1977). Beef checkoff-funded television ads, which ran more than 1,500 times in 2003 alone, include the attribution line "Funded by America's Beef Producers." Cattlemen's Beef Board (CBB), *2003 Beef Board Annual Report*, 6 (2004), *available at* http://www.beefboard.org/documents/2003%20Annual%20Report.pdf; http://www.beefitswhatsfordinner.com/ads/tv.asp. Print ads similarly state that they are "Funded by America's

[7] *Amici* join Respondents in asserting that the "so-called government speech doctrine" is inapplicable here, where the speech is funded solely by "America's Beef Producers." *See Keller*, 496 U.S. at 10-11; *MPPA* II, 348 F.3d at 161-62.

Beef Producers."[8] *See, e.g.*, http://www.beefitswhatsfordinner.com/ads/default.asp.

In addition to being compelled to associate with objectionable speech, ranchers are compelled to associate with the organizations that administer the checkoff programs—associations to which they fervently object. For example, even though dissenting ranchers are not forced to become actual members of the National Cattlemen's Beef Association (NCBA), their money is used to support it as the general contractor for the beef checkoff and fund its checkoff-related expressive activities. *See* http://www.beefitswhatsfordinner.com/footer/aboutus.asp. NCBA, a private, non-profit organization, has annual revenues of approximately $62,500,000, of which 87% comes from ranchers' beef checkoff dollars.[9] Joint Appendix (J.A.) 185-87. NCBA is virtually indistinguishable from CBB, the organization actually charged with administering the beef checkoff.[10] The

[8] The same is true for the pork and dairy checkoff programs. Pork checkoff-funded communications, such as advertising, press releases, reports, and producer communications proclaim that they are being brought to the audience by "America's Pork Producers." *MPPA* I, 229 F. Supp. 2d at 786. Dairy checkoff funded advertisements are also attributed to "America's Dairy Farmers and Milk Processors." *See* http://www.whymilk.com/celebrity_cc_history_vint.htm (showing tv ads), http://www.whymilk.com/celebrity_archive.htm (showing print ads).

[9] It is telling that nowhere in Petitioners' briefs do Petitioners mention NCBA, let alone its unbridled power over the beef checkoff.

[10] For instance, a visitor to the website www.beef.org would find it impossible to discern with any certainty if the website belongs to NCBA, whose name appears prominently on the home page, or if the website is the official beef checkoff website. That same home page prominently displays the "Beef, It's What's For Dinner" logo, and bears an icon with a large red check, apparently referring to the beef checkoff. Clicking on that icon directs the reader to a CBB website, which contains only general information about the beef checkoff. *See* http://www.beefboard.org/. Communications to ranchers typically refer the readers to both CBB's and

so-called "firewall" between NCBA's checkoff-funded activities and its non-checkoff-funded activities[11] has been referred to by some ranchers as a "myth" and a "joke." J.A. 197-98, 205. *See also, Livestock Mktg. Ass'n v. USDA*, 132 F. Supp. 2d 817, 822-23 (D.S.D. 2001).

The CBB website, which is funded entirely by checkoff dollars, describes NCBA as follows:

> Producer-directed and consumer-focused. NCBA is the trade association of America's cattle farmers and ranchers, and the marketing organization for the largest segment of the nation's food and fiber industry. It is the nonprofit domestic planning and marketing organization responsible for increasing demand for U.S.-produced beef and an authority on beef and its related topics.
>
> The NCBA works on behalf of America's Beef Producers and is contracted by the Cattlemen's Beef Promotion and Research Board.

http://www.beefitswhatsfordinner.com/askexpert/inthenews.asp. NCBA repeats this claim in its checkoff communications. *See, e.g.*, http://www.beef.org/dsp/dsp_content.cfm?locationId=44&contentTypeId=2&contentId=2648.

NCBA's claim to be the "trade association of America's cattle farmers and ranchers" is objectionable to the many ranchers who disagree with the mandatory beef checkoff and the policies of NCBA. Many ranchers have chosen to associate with other organizations that they believe better represent their interests, such as Respondent Western

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NCBA's websites. *See, e.g.*, http://www.beefboard.org/documents/dairy_nutrition%20Dec%2023.pdf.

[11] CBB itself admits the alleged distinction is confusing. *See* CBB Press Release, *Defining the Separate Roles of the Beef Board and Other Checkoff Players* (Dec. 5, 2003), *available at* http://www.beefboard.org/dsp/dsp_content.cfm?locationId=1071&contentTypeId=2&contentId=2383.

Organization of Resource Councils or *Amici* groups like the Kansas Cattlemen's Association, or the South Dakota Stockgrowers Association. *See, e.g.*, J.A. 200-01, 209, 215-16, 218-19, 222-23. Indeed, out of the nearly one million cattle ranchers in the United States, NCBA can claim only about 33,000 individual members. *See* http://www.beef.org/dsp/dsp_locationContent.cfm?locationId=881.

Despite many ranchers' opposition to NCBA's baldly political positions, the mandatory checkoff unavoidably associates all ranchers with NCBA's political advocacy. NCBA's political activism is ostensibly funded with the 13% of the its budget that does not come from the beef checkoff, but CBB and NCBA portray NCBA messages as coming from all ranchers. The www.beef.org website that includes commingled beef checkoff information and NCBA policy information (on which NCBA is prohibited from spending checkoff funds) includes a section of press releases on a variety of policy issues. One of the more recent releases announces the decision of the NCBA Board that NCBA PAC would "endorse and financially support" George Bush because his policies "most closely match the policies of the NCBA." NCBA Press Release, *NCBA PAC Endorses President George W. Bush* (Aug 13, 2004), *available at* http://www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2731. Apparently the reader of the website is supposed to surmise that this particular press release was not paid for or associated with the beef checkoff, since it does not have a little red checkmark next to it. However, since NCBA's "unanimous" endorsement was—as intended—covered by the media (*e.g.*, Philip Brasher, *Politics Thrusts Ag Stakes Higher*, Des Moines Register, Aug. 29, 2004), a reader would not be able to determine that NCBA's actions were not funded by the beef checkoff and not spoken on behalf of all ranchers. As an example of the confusion, President Bush stated in his speech thanking NCBA: "Jan Lyons, President of the National Cattlemen's Beef Association is with us. They have given me their

endorsement. I am honored to be endorsed by the Cattlemen of the United States of America." Speech Transcript (Aug. 31, 2004), *at* http://georgewbush.com/FarmAndRanch/Read.aspx?ID=3414.

NCBA also publicly advocates for policy positions that violate the dissenters' core beliefs. One of the Respondents' primary objections to the mandatory beef checkoff is that its promotions do not distinguish imported beef from domestic beef, which Respondents believe is a better product. J.A. 35, 66, 190-91. The 2002 Farm Bill included a provision making it mandatory to label food, including meat, as to its country of origin. Pub. L. No. 107-171, § 10816, 116 Stat. 134, 533 (2002). One of the objectives of this Country of Origin Labeling (COOL) provision was to inform consumers whether the beef they buy comes from cattle raised, slaughtered, and packaged in the United States. NCBA, however, has actively opposed mandatory COOL. Jerry Hagstrom, *COOL Battle Far From Over*, AgWeek, Dec. 8, 2003, *available at* http://www.grandforks.com/mld/grandforksherald/7439869.htm. In 2004, at the urging of groups such as NCBA, Congress delayed funding of COOL, a move that outraged farmers and ranchers. Pub. L. No. 108-199, § 749, 118 Stat. 3, 37 (2004). As submitted by Senator Tim Johnson to the Congressional Record:

> Ann Veneman herself helped identify some of the culprits who killed COOL. She fingered the NCBA, the National Pork Producers Council and the United Fresh Fruit and Vegetable Association as the groups responsible for blocking its implementation. Yes, the primary contractor for your checkoff dollars, an outfit that may not even exist without your beef bucks, the NCBA, stabbed you right in the back. Again.

150 Cong. Rec. S174-S175 (daily ed. Jan. 22, 2004).

The mandatory beef checkoff compels ranchers to associate with the organizations that administer the beef

checkoff and the objectionable speech it generates in myriad ways. This compulsion offends ranchers' First Amendment right to refrain from association with objectionable groups and their messages. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

B. The Beef Act Serves the Interests of Packers and Retailers and Not a Paramount Governmental Interest, Making Packers and Retailers the True Free Riders of the Checkoff.

"It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (citing *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976)). Encroachment of First Amendment rights "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod*, 427 U.S. at 362.

In order to justify interfering with an individual's association rights by compelling assessments to fund objectionable speech, the government bears the burden of showing an "overriding associational purpose which allows any compelled subsidy for speech in the first place." *United Foods,* 533 U.S. at 413. In the labor context, the "overriding associational purpose" that justifies compelling employees to pay their share of collective bargaining activities is Congress's interest in furthering "industrial peace and stabilized labor-management relations." *Ry. Employees' Dept. v. Hanson*, 351 U.S. 225, 233-34 (1956); *see also Abood*, 431 U.S. at 219. The "overriding associational purpose" justifying compelled payments to an integrated state bar association is the state's interest in ensuring educational and ethical standards for attorneys that provide legal services to the state's citizens. *Keller,* 496 U.S. at 12, 16; *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality).

The Court already has held that there is no "overriding associational purpose" justifying compelled subsidies for the promotion of agricultural commodities in the absence of a greater collective regulatory scheme. *United Foods*, 533 U.S. at 415. In contrast to *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), which addressed the promotion portion of a broader marketing order mandating the collectivization of California tree fruit production to such an extent that the industry was exempted from antitrust laws, the Mushroom Act at issue in *United Foods* was a stand-alone statutory promotion program. *See United Foods*, 533 U.S. at 415-16. Because there was no "law or necessity" justifying the compelled association of mushroom growers in the first place, the compelled subsidies for the mushroom checkoff speech were declared unconstitutional. *Id.* at 413, 414-16.

Petitioners' briefs omit this threshold inquiry. Like the Mushroom Act, the Beef Act was enacted as a stand-alone promotion program and is not part of a greater collectivized statutory scheme. U.S. Pet. App. 11a, 47a. Accordingly, like the Mushroom Act, because there is no justification for the compelled association in the first instance, the compelled assessments under the Beef Act are unconstitutional.

The only governmental interest asserted by the Petitioners to justify the Beef Act's infringement of ranchers' First Amendment rights is found in their discussion of the intermediate standard of scrutiny applied to restrictions on commercial speech. Petitioners assert that the Beef Act advances a "substantial" government interest by "enhancing 'the welfare of beef producers,' stabilizing 'the general economy of the Nation,' and 'ensur[ing] that the people of the United States receive adequate nourishment.'" Brief for the Federal Petitioners (U.S. Br.) 47 (citing 7 U.S.C. § 2901(a)(3) and (4)). These asserted interests do not satisfy the intermediate standard of scrutiny used for analyzing restrictions on commercial speech, *see infra*, let alone the

"exacting scrutiny" required for the Beef Act's significant impairment of ranchers' association rights.

Congress has enacted multiple, competing checkoff programs. The fact that pork competes against beef in the marketplace and *vice versa* undermines any claim that the government's interest in promoting one or the other is substantial, and makes it impossible for any one checkoff program to be found "of vital importance." *See infra* at 24-25. Moreover, while asserting that the governmental interest in the mandatory beef checkoff and other checkoffs is to "stabiliz[e] 'the general economy,'" the government cannot plausibly argue that it has a paramount interest in simply promoting *more* consumption of *all* agricultural products covered by mandatory checkoffs, given USDA's conflicting interest in providing education to consumers on nutrition and healthy eating, including the well-known Food Guide Pyramid. *See* 69 Fed. Reg. 42,030 (July 13, 2004). For example, while compelling hog farmers to pay some $50 million per year to promote pork and pork products, USDA also urges consumers to "Limit your intake of high-fat processed meats such as bacon, sausages, salami, bologna, and other cold cuts." *See* USDA, *Nutrition and Your Health: Dietary Guidelines for Americans* (5th ed. 2000), *available at* http://www.health.gov/dietaryguidelines/dga2000/document/choose.htm. As set forth in more detail below, rather than promoting a governmental interest, the mandatory checkoffs in reality promote the interests of the private participants in each industry. *See infra* at 23-24.

Petitioners assert that the government has a "vital" policy interest in avoiding free riders, thus necessitating a mandatory beef checkoff. U.S. Br. 48 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-21 (1991)). This argument misapprehends the nature of the checkoffs and the meaning of the term "free riders," which is applicable only in a constitutionally justified collective enterprise. The concern about free riders was articulated by the Court in the context of

upholding agency shop agreements in which the union is the exclusive collective bargaining representative for union and non-union members. *Hanson*, 351 U.S. at 233-35; *Lehnert*, 500 U.S. at 519. The Court upheld the requirement that nonunion members be compelled to pay for costs related to unions' collective bargaining duties, since the unions were obligated by statute to represent the non-members, and non-members would benefit in equal share as members. Accordingly, to prohibit the non-members from benefiting as free riders from the unions' statutorily imposed bargaining obligations in agency shop arrangements, non-members could be required to pay for certain costs over their objections. *See Lehnert*, 500 U.S. at 520-21 ("nonunion workers ought not to be allowed to benefit from the terms of employment secured by union efforts without paying for those services..."); *Ellis v. Brotherhood of Ry.*, 466 U.S. 435, 452 (1984) ("the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members").

The free rider concern also arises for heavily regulated industries, as was the case in *Glickman*, where individuals could "take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government." *United Foods, Inc. v. United States*, 197 F.3d 221, 224 (6th Cir. 1999). The concern about free riders thus is applicable only where there is collective activity that itself is justified by a paramount government interest. It has no applicability here, where the beef industry is not collectivized, and the participants in that industry are free actors, not free riders.

Moreover, that some individuals who choose not to participate in a voluntary checkoff may benefit from the advertising of those who do, does not provide sufficient justification for compelling all farmers and ranchers to contribute and be forced into objectionable association.

"[P]rivate speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in part and dissenting in part). Indeed, the persons who benefit *most* from mandatory checkoffs are not the farmers and ranchers who pay for them, but the processors and retailers, whose products are being marketed at farmers' and ranchers' expense. U.S. Pet. App. 48a.

II. THE BEEF CHECKOFF VIOLATES RANCHERS' FIRST AMENDMENT RIGHT OF FREEDOM OF SPEECH.

A. Checkoff-Funded Speech Is Inextricably Intertwined With Expressly Ideological And Politically Partisan Speech.

The Court has unequivocally concluded that commercial speech is entitled to First Amendment protection. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The Court settled on a three-part test providing for "intermediate scrutiny" of restrictions on commercial speech, rather than the highest level of scrutiny, in its decision in *Central Hudson Gas & Elec. Corp. v. Public Ser. Comm'n*, 447 U.S. 557, 566 (1980). Once thought to be "commonsense," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978), the definition of "commercial speech" for purposes of determining which level of scrutiny applies, has proven to be more elusive as communication and marketing tools become more sophisticated. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 676-79 (2003) (Breyer, J. dissenting); *United Foods*, 533 U.S. at 409-10.

Although the Court in *Central Hudson* described commercial speech as "expression related solely to the economic interests of the speaker and its audience" (447 U.S. at 561), the Court has acknowledged the "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *Cincinnati v. Discovery Network, Inc.*,

507 U.S. 410, 419 (1993) (noting that advertising publications "share important characteristics with the publications …classifie[d] as 'newspapers.'"). It is also established that the mere fact that a publication contains an advertisement or a reference to a specific product does not convert that speech into commercial speech. *See Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964)). In analyzing what level of scrutiny to apply to a state statute that compelled professional fundraisers to disclose certain information to potential donors, the Court explained:

> [E]ven assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.

Riley v. Nat'l Fed'n. of the Blind, 487 U.S. 781, 796 (1988).

Taking the nature of the speech as a whole, speech funded by mandatory checkoffs does not fall into the narrow category of speech that is solely commercial. Set against the backdrop of the political and philosophical divide between those who advocate for further industrialization of agriculture and those who are attempting to preserve family farming and rural communities, the speech supported by mandatory checkoffs can only be seen as economic, political, and

ideological.[12] As this Court noted in *Abood*, "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." 431 U.S. at 231.

By paying the mandatory checkoff, family farmers and ranchers are compelled to subsidize speech that supports a system of agriculture they believe is driving them out of existence. *See, e.g.*, U.S. Pet. App. 48a; *MPPA* I, 229 F. Supp. 2d at 790-91. Through the checkoff, farmers and ranchers are forced to subsidize the marketing of products they neither sell nor earn a profit from. Ranchers sell cattle, not beef. Hog farmers sell hogs, not pork. Ranchers' share of the retail beef dollar declined from nearly 70% in the 1970s to below 50% in 1996. Kenneth H. Mathews, Jr., *U. S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration*, 18-19 (Apr. 1999), *available at* http://www.ers.usda.gov/publications/tb1874/tb1874.pdf. Similarly, hog farmers' share of the retail pork dollar declined from 42.5% to 30.1% between 1996 and 2001. *MPPA* I, 229 F. Supp. 2d at 776. Family farmers and ranchers thus understandably believe that their checkoff dollars are enriching retailers and processors, to their detriment.

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[12] The records of the pending legal challenges to mandatory checkoffs demonstrate that the objecting farmers and ranchers strongly disagree with the speech they are compelled to fund. *See, e.g.*, U.S. Pet. App. 11a, 48a; *MPPA* I, 229 F. Supp. 2d at 790; *Cochran v. Veneman*, 359 F.3d 263, 266-67 (3d Cir. 2004) *petition for cert. filed* (U.S. Sept. 30, 2004) (No. 04-446). This distinguishes this case and other pending cases from *Glickman*, in which the Court presumed that the producers agreed with the advertising message. 521 U.S. at 469-70. As well, the finding by the district court that objecting hog farmers have "sincere philosophical, political and commercial disagreements" to pork checkoff-funded speech (*see MPPA* I, 229 F. Supp. 2d at 790), obviates the Court's further assumption in *Glickman* that producers were not compelled to finance "political or ideological views." 521 U.S. at 469-70.

Moreover, mandatory checkoffs compel farmers and ranchers to subsidize the promotion of products raised using methods with which they disagree. For example, the challengers to the dairy checkoff operate a small dairy, employing traditional methods of dairy farming. They emphatically believe that their method of farming—which allows cows more room to roam and graze than industrial methods allow, and which eschews the use of the recombinant Bovine Growth Hormone (rBGH)—results in healthier cows, a cleaner environment, and superior milk. *Cochran*, 359 F.3d at 266-67. Family hog farmers similarly object to funding the generic promotion of pork from hogs that are raised employing methods commonly used in factory farms, such as continuous feeding of antimicrobials. *MPPA* I, 229 F. Supp. 2d at 777. Some objecting ranchers raise grass-fed cattle without the use of artificial hormones, subtherapeutic antibiotics, chemical additives, extra water, and irradiation. *Charter v. USDA*, 230 F. Supp. 2d 1121, 1122 (D. Mont. 2002). They have strongly held views regarding ranching methods, nutrition, and food safety which are often diametrically opposed to the products promoted by the beef checkoff. *See, e.g.*, NCBA Press Release, *Beef Checkoff Educates Consumers About Irradiated Beef* (May 11, 2004), *available at* http://www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2621. The generic promotion of commodities lumps those raised by independent family farmers using what they believe are healthy and humane practices with those raised in factory farms—the same mega-farms that are driving family farmers out of existence.[13]

[13] Speech funded under the "research" and "consumer information" portions of the checkoffs often blatantly supports industrialized agriculture. For example, a primary focus of research funded by the pork checkoff is in the area of "Antimicrobial Resistance and Alternatives Research," meaning the continuous feeding of subtherapeutic levels of antibiotics to hogs to promote growth and prevent disease—a practice many independent family farmers scorn. *See MPPA* I, 229 F. Supp. 2d at 777. Pork checkoff challenger James Joens opposes checkoff-funded "education" about the same practices:

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large confinement facilities.

MPPA I, 229 F. Supp. 2d at 776.

As agriculture rapidly becomes vertically integrated, packers control more livestock through captive supply arrangements, and the number of packers dwindles while their size and market power swells, generic promotion that fails to distinguish the unique qualities of family farm-raised commodities continues to harm family farmers. In the struggle to stay on their land with ever-shrinking farm income,[14] the money farmers and ranchers are forced to pay to fund generic promotion has a direct impact on their daily lives. *See MPPA* I, 229 F. Supp. 2d at 775-76.

Even more galling to farmers is "branded advertising," which uses checkoff dollars to promote the products of particular packers and retailers. *See, e.g., id.* at 776 (promoting Smithfield and Hormel pork); *see also,* http://www.beefmark.com (promoting Smithfield and Tyson beef products, among others); http://www.dairycheckoff.com/check/hl0904.asp (promoting Safeway). Because packers increasingly own livestock, checkoff-funded branded advertising forces farmers and ranchers to pay for the advertising of their direct competitors. The packers whose advertising budgets are being subsidized by farmers are also direct competitors of farmers who process and market their own products. *See MPPA* I, 229 F. Supp. 2d at 776.

The speech funded by the mandatory checkoffs—whether it is generic advertising, "branded" advertising, publications

[14] Average operator earnings from farming in 2003 were $3,991. *See* http://www.ers.usda.gov/Briefing/FarmIncome/Data/Hh_t5.htm.

pronouncing the results of "research," or "consumer information"—certainly encompasses more than just "expression related solely to the economic interests of the speaker and its audience." While the speaker in beef-checkoff funded ads is "America's Beef Producers," the speech relates less to the economic interests of ranchers than it does the economic interests of packers and retailers. Moreover, the commercial nature of checkoff-funded speech is interwoven with its underlying ideological, philosophical, and political nature. Speech that represents and supports a system of agriculture that is anathema to the objecting farmers' core economic, ideological, and political beliefs cannot be said to be merely "commercial."[15] Taken as a whole, the compelled funding of speech through the mandatory checkoffs must be given the highest level of scrutiny under the First Amendment. The compulsion to fund messages that promote a system of agriculture that is repugnant to farmers' and ranchers' economic, philosophical, and political interests must also be repugnant to the Constitution.

B. The Beef Checkoff, Paid Solely By Ranchers To Benefit The Beef Industry, Fails The *Central Hudson* Test.

Even if the speech at issue is deemed commercial, *Central Hudson* provides that the government may regulate it only if: (1) "the asserted government interest is substantial," (2) the regulation "directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Petitioners have failed to meet their burden under *Central Hudson*, which "is not satisfied by mere speculation

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[15] Although the Eighth Circuit concluded that the test for a restriction on commercial speech set forth in *Central Hudson* is applicable to the claims at issue in this case, it did so without analysis of the nature of the speech, and ultimately correctly applied *United Foods*. U.S. Pet. App. 24a-28a.

or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

1. The government's interest is not substantial.

Petitioners maintain that the beef checkoff advances a substantial governmental interest by "enhancing 'the welfare of beef producers' and other members of the $50 billion beef industry," and "stabilizing 'the general economy of the Nation.'" U.S. Br. 47, citing 7 U.S.C. § 2901(a)(3) and (4). Petitioners also cite *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989), *cert denied*, 493 U.S. 1094 (1990) (O'Connor, J., not participating), for the proposition that the beef checkoff prevented the further decay of the beef industry. U.S. Br. 39-40. Petitioners are wrong for a number of reasons. First, the Third Circuit's recent decision in *Cochran*, a dairy checkoff challenge, limited its prior holding in *Frame* on this very issue:

> As in *Frame*, the Government here argues that it has a sufficient interest in increasing the demand for an agricultural product. . . . We previously have emphasized, however, that the Court's subsequent holding in *United Foods* that clarified and limited the teachings of *Glickman*, cut away the underpinning of this court's analysis in *Frame*. *United Foods* makes clear that the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product. . . . As Judge Sloviter suggested in her dissent in *Frame*, promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's.

359 F.3d at 279.

Second, it has long been accepted that checkoff programs were created as "self-help" programs to serve private industry

interests, rather than a governmental interest. *See id.*; J.A. 101-02; *MPPA* II, 348 F.3d at 161; *see also*, *Glickman*, 521 U.S. at 495 (Souter, J., dissenting) ("the legislative history shows that from time to time Congress has simply amended the [Agricultural Marketing Agreement Act of 1937] to add particular commodities to the list at the request of interest producers or handlers, without ever explaining why compelled advertising programs were necessary for the specific produce chosen and not others.").

Third, in discussing the importance of the beef industry to the American economy, Petitioners fail to mention that the government has other compelled speech programs that compete with beef. For example, the pork checkoff program has identified beef as being in competition with pork.[16] The lamb checkoff program compares the nutritional value of lamb to other meats, including beef and pork. American Lamb Board, *Nutrition: Lamb v. Other Meats*, *available at* http://americanlambboard.org/?page=site/text&nav_id=d04debdf9e79843987ec6352c78be6d2. CBB, through beef checkoff promotions, bragged that in 1999, for the first time in 20 years (in 15 of which the mandatory beef checkoff existed), beef consumption increased, "despite stiff competition from pork and poultry." CBB Press Release, *Beef Demand Stabilizes After 20-Year Slide* (Jan. 26, 2000), *available at* http://www.beefboard.org/dsp/dsp_content.cfm?locationId=1071&contentTypeId=2&contentId=415. In addition to enacting numerous competing checkoff programs, Congress

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[16] NPB Press Release (June 18, 2001), *available at* http://www.porkboard.org/News/NewsEdit.asp?NewsID=101 ("With pork's increase in popularity, the industry continues to share the message that pork can compete with beef."); NPB Press Release (April 16, 2002), *available at* http://www.porkboard.org/News/NewsEdit.asp?NewsID=266 ("But with abundant supplies [of pork] and low prices for beef and poultry, there is bound to be some substitution."); NPB Press Release, (June 7, 2001), *available at* http://www.porkboard.org/News/NewsEdit.asp?NewsID=95 ("At the consumer level, pork competes with beef.").

also enacted the Commodity Promotion, Research and Information Act of 1996 that allows agricultural industry groups to petition the Secretary of Agriculture to implement new checkoff programs. 7 U.S.C. §§ 7411-7425. As the district court aptly queried: "After all, is the 'government message' that consumers should eat no other product [other than beef] or at least reduce the consumption of other products such as pork, chicken, fish, or soy meal?" U.S. Pet. App. 56a.

In *Greater New Orleans Broad. Ass'n v. United States*, the Court held that a federal restriction on advertising related to casino gambling did not satisfy *Central Hudson*'s substantial governmental interest requirement in part because Congress also sanctioned some forms of gambling. 527 U.S. 173, 186-87 (1999). The Court held that it "cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General." *Id.* By authorizing multiple, competing checkoffs, Congress is not promoting the welfare of cattle ranchers; rather, it is promoting the interests of competing agricultural industry groups that are on the gravy train of checkoff funding. That interest does not justify compelled assessments' impingement on ranchers' First Amendment rights.

2. The beef checkoff does not directly advance any asserted government interest.

Even if a substantial government interest can somehow be derived amongst the multitude of checkoffs, the beef checkoff does not directly advance the asserted government interest to "enhance the welfare of beef producers." U.S. Br. 39-40. Presumably by this Congress meant American cattle ranchers. *See* 7 U.S.C. § 2901(a)(2). One of Respondents' primary objections to the beef checkoff is that it treats all beef the same, including imported beef, to the detriment of domestic ranchers. J.A. 35, 222-23. By doing so, the beef checkoff fails tc directly advance the asserted government interest of enhancing the welfare of American ranchers.

Furthermore, the record in this case contains no evidence suggesting that the beef checkoff has a beneficial effect on the live prices ranchers receive when they market cattle (and are forced to pay the mandatory beef checkoff). Instead, the analysis cited by Petitioners is limited to changes in demand for beef. U.S. Br. 40. Ranchers sell cattle, not beef. Packers and retailers sell beef. If the beef checkoff has helped anyone, it is retailers and processors—who do not pay the beef checkoff. *See* U.S. Pet. App. 48a. The checkoff's failure to enhance the welfare of American cattle ranchers—indeed, its inherent inability to do so—precludes any finding that the compelled speech directly advances the government's asserted interest.

3. The beef checkoff is far more extensive than necessary to serve any asserted governmental interest.

By compelling objectionable speech, the beef checkoff burdens ranchers' First Amendment rights more than necessary to advance the asserted governmental interest. To be valid under *Central Hudson*, compelled speech must be the last means utilized to serve the asserted government interest. *See Thompson v. W. Med. States Ctr.*, 535 U.S. 357, 373 (2001) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try."). The government has available to it a vast array of strategies it can use and has used to promote the beef industry, short of violating ranchers' First Amendment rights.

If the government's interest in the welfare of cattle ranchers were substantial, and if the government truly believed that generic promotion programs directly advance that interest, the government could use funds from general revenues to fund the same projects, as the Fifth Circuit recently noted in a decision striking down a state alligator

checkoff.[17] *See Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 434 n.21 (5th Cir. 2004) *petition for cert. filed* (U.S. June 30, 2004) (No. 04-23). ("Louisiana does not need to compel alligator harvesters to support generic marketing, but could simply fund generic marketing from its general tax revenues."). Indeed, the government has funded projects to "enhance the welfare of beef producers" in the past and has proposed doing so in the current appropriations cycle.[18] For example, the Livestock Compensation Program provided government payments to farmers and ranchers based on losses sustained due to natural disasters. 67 Fed. Reg. 63,070 (Oct. 10, 2002).[19] In addition, the government's response to Bovine Spongiform Encephalopathy (BSE), or Mad Cow disease, has come from USDA taxpayer-funded programs and is not dependent on the existence of the beef checkoff.[20] In

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[17] The Court has recognized that constitutional interests outweigh any governmental interest in pecuniary savings. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 28 (1981) (explaining that although North Carolina's interest in pecuniary savings was legitimate, it could not overcome the Due Process rights of its citizens).

[18] In order to increase demand for beef, USDA's Agricultural Marketing Service has a Commodity Procurement Program that purchases beef. J.A. 128; 7 U.S.C. § 612c. Also, states have enacted agricultural commodity purchase programs. *See* Neil D. Hamilton, *Putting a Face on Our Food: How State and Local Food Policies Can Promote the New Agriculture*, 7 Drake J. Agric. L. 404, 424-27 (2002).

[19] The Small Hog Operation Payment program likewise provided small hog farmers payments based on past production in response to historically low hog prices in 1998 and 1999. 7 C.F.R. pt. 716. For dairy farmers, USDA's Milk Income Loss Contract program compensates dairy farmers when domestic milk prices fall below a specified level. 7 U.S.C. § 7982.

[20] For 2005, USDA has budgeted $60 million for BSE-related activities. *See* http://www.usda.gov/agency/obpa/Budget-Summary/2005/19.BSE.htm. The House and Senate also have both passed bills for additional BSE-related programs in the pending agricultural appropriations bills. *See* H.R. Rep. No. 584, 108th Cong. at 43, 51, 85 (2004); S. Rep. No. 340, 108th Cong. at 65, 81, 148 (2004).

any event, consumers are not protected by beef checkoff speech; they are protected by food and feed safety regulations that will prevent BSE. *See, e.g.*, 21 C.F.R. § 189.5; 69 Fed. Reg. 1,694 (Jan. 12, 2004). Also, NCBA opposes COOL, the law that would inform consumers which country beef comes from so they can avoid buying beef from cattle raised in countries where BSE has been detected. Petitioners' cries that the beef industry will collapse without the mandatory checkoff ring hollow in light of the facts.

Petitioners argue that the mandatory beef checkoff "solves the collective action problem by eliminating the possibility of free riding." U.S. Br. 40. In addition to the arguments at pages 15-17, *supra*, refuting Petitioners' unsupported free rider theory, there are other reasons why Petitioners' free rider argument is misplaced. Congress has demonstrated that the purported free rider problem does not exist in this context. For example, Congress does not always require every producer of a commodity to pay mandatory assessments for the commodity's promotion, research, and consumer information program. In 2002, Congress exempted all certified organic farmers, including organic cattle ranchers, from paying mandatory checkoff assessments. 7 U.S.C. § 7401(e). And some checkoff programs impose mandatory assessments only on producers and processors with a certain minimum annual production or acreage.[21] Oral

[21] *See, e.g., Dairy Act*, 7 U.S.C. § 4502(l) (exempting dairy producers from outside the 48 contiguous states); *Fluid Milk Promotion Act*, 7 U.S.C. § 6402(4) (exempting fluid milk processors who process 3 million pounds or less per month); *Popcorn Act*, 7 U.S.C. § 7482(11) (exempting processors who process 4 million pounds of popcorn or less per year); *Honey Act*, 7 U.S.C. § 4606(e)(4) (exempting producers who market less than 6,000 pounds of honey per year); *Potato Act*, 7 U.S.C. § 2612(e) (exempting farmers who grow less than 5 acres of potatoes); *Watermelon Act*, 7 U.S.C. § 4902(5) (exempting farmers who grow less than 10 acres of watermelons); and *Blueberry Order*, 7 C.F.R. § 1218.53 (exempting growers who produce less than 2,000 pounds of cultivated blueberries per year).

Argument Tr., *United States v. United Foods, Inc.*, No. 00-276, 16, ll. 3-7 (Apr. 17, 2001) (counsel for United States) (conceding that the mushroom checkoff is not imposed "on all those who benefit from the speech."). This means that, for each of these checkoff programs, there are "free riders," in Petitioners' parlance.

By exempting certain categories of producers and processors from compelled financial support of promotion programs—programs whose benefit, if any, presumably inures to the non-paying producers and processors of the commodity as well as the paying contributors—Congress has shown that avoiding a free rider problem is not of paramount concern under the checkoff programs. Specifically for this case, Congress's willingness to exempt organic ranchers from paying the beef checkoff reveals its belief that the program's intended benefits are attainable without the financial support of all ranchers. If not all are needed, Petitioners' general free rider argument thus falls flat and the mandatory beef checkoff cannot meet the Court's test that any regulation be "narrowly tailored to achieve the desired objective." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001). The true free rider problem under the beef checkoff is that only one segment of the beef industry—the cattle rancher—is forced to pay the checkoff to support a program that is intended to "strengthen the position of the beef industry in the marketplace." 7 U.S.C. § 2901(b); *see also* U.S. Br. 41 ("[The Beef Act] requires only that cattle producers contribute financially to generic advertising (and other activities) designed to benefit the beef industry as a whole by promoting the sale of the product that the industry exists to market."). Since the burden of the beef checkoff falls only on ranchers, while the benefits accrue largely, if not entirely, to other participants in the industry—the marketer, meatpacker, food retailer—Petitioners cannot claim that the Beef Act is "not more extensive than is necessary."

CONCLUSION

For the foregoing reasons and the reasons set forth in Respondents' Brief, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

List of *Amici*

1. American Agriculture Movement
2. American Corn Growers Association
3. American Raw Milk Producers Pricing Association
4. Citizens Action Coalition of Indiana
5. Dakota Resource Council
6. Dakota Rural Action
7. Empire State Family Farm Alliance
8. Family Farm Defenders
9. Farm Wives United
10. Federation of Southern Cooperatives
11. Fort Berthold Land and Livestock Association
12. Idaho Rural Council
13. Illinois Farmers Union
14. Illinois Stewardship Alliance
15. Indiana National Farmers Organization
16. Intertribal Agriculture Council
17. Iowa Citizens for Community Improvement
18. Iowa Farmers Union
19. Kansas Cattlemen's Association

20. Kansas Rural Center
21. Land Stewardship Project
22. Minnesota Farmers Union
23. Minnesota National Farmers Organization
24. Missouri Farmers Union
25. Missouri Rural Crisis Center
26. Missouri Stockgrowers Association
27. National Catholic Rural Life Conference
28. National Family Farm Coalition
29. National Farmers Organization
30. National Farmers Union
31. Nebraska Farmers Union
32. Northern Plains Resource Council
33. Northern Plains Sustainable Agriculture Society
34. Oregon Farmers Union
35. Pennsylvania Farmers Union
36. Powder River Basin Resource Council
37. Rocky Mountain Farmers Union
38. Rosebud Indian Land and Grazing Association
39. Rural Advancement Foundation International-USA
40. Rural Coalition
41. Rural Vermont

42. South Dakota Stockgrowers Association
43. Southern Sustainable Agriculture Working Group
44. Sustainable Agriculture Coalition
45. Western Colorado Congress
46. Western Sustainable Agriculture Working Group
47. Wisconsin Farmers Union
48. Women, Food and Agriculture Network
49. Yahara Food Farm Coalition